Rohgetana a/p Mayathevan (an infant suing through his father and litigation representative, Mayathevan a/l Mayandi) v Dr Navin Kumar & Ors and other appeals

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS M-01(IM)-273–08 OF 2015, M-01(IM)-274–08 OF 2015 AND M-01(IM)-275–08 OF 2015
VARGHESE GEORGE, ZAMANI RAHIM AND ZALEHA YUSOF JJCA
4 JANUARY 2017

Tort — Damages — Assessment — Damages for negligence — Appeal against award made — Whether judge right in assessment of damages — Whether there were grounds for challenging awards for those items listed under category of special damages, pre-trial damages or future damages — Whether judge erred in calculating multiplier to be applied in present case

Rohgetana a/p Mayathevan ('the infant') through her parents ('the plaintiffs') had sued Dr Navin Kumar and Dr Darminder Singh Chopra, the medical officers attending to the infant, for damages premised on a cause of action in medical negligence, which had occurred during the infant's birth at the Malacca Hospital ('the hospital'). The plaintiffs claimed that the professional negligence of the doctors ('the defendants') had resulted in the infant suffering from cerebral palsy. The hospital was also sued on the grounds that it was vicariously liable for the negligence of the doctors. The defendants admitted to liability and a consent judgment was entered, with the issue of damages remitted to the deputy registrar for assessment. The deputy registrar awarded damages under four categories, namely special damages for loss or expenses incurred before the filing of the suit; pre-trial damages for loss or expenses incurred between the filing of the suit and the date of assessment; future damages; and general damages. The damages awarded to the plaintiffs amounted to a total sum of RM6,934,129.30. However, both parties were dissatisfied and filed their respective appeals to the judge in chambers, who revised downwards the sum awarded to the plaintiffs to a total sum of RM4,859,322.76. The plaintiffs and defendants have now filed their respective appeals against the decision of the judge in chambers. The defendants' grounds of appeal were inter alia that only such expenses incurred as could be supported by documentary evidence ought to be allowed as special damages; that in respect of pre-trial damages there ought to be an adjustment downwards; and that in respect of future damages the quantum awarded was unreasonable. The plaintiffs appealed against the judge's decision to revise the derived multiplier with respect to the life expectancy of the infant from 40 years to 28 years. It was the plaintiffs' submission that the revision was erroneous and low and the

deputy registrar's assessment should be reinstated. It was also the plaintiffs' contention that it was no longer the law that only a sum of one-third of the sum claimed would be allowed for heads of claims in respect of which medical attention, medication and treatments were available at government hospitals that were accessible to the infant plaintiff, whether it was for past or future damages. The plaintiffs further argued that the judge had erred in rejecting their claim for holiday and respite care and their claim for living expenses for the infant after the latter attained 18 years of age.

Held, adjusting the sum awarded to the plaintiffs as damages:

(1) Although the defendants persisted that only such expenses for therapies and medicine incurred as could be supported by receipts or documentary proof ought to be allowed, the judge had not misdirected himself on the law when he held that special damages for these items, so long as they were pleaded and particularised, could be proved by oral or documentary evidence. Such claims were to be allowed as long as they were within a reasonable sum and justifiable in the circumstances. There was no reason to interfere with the award of the deputy registrar and judge in respect of therapies and complimentary medicine under the category of special damages. For the same reasons, the sums awarded for medication and therapies under the category of pre-trial damages should also be allowed (see paras 16).

(2) The judge's revised quantum in respect of the claims for 'care by mother' and 'nutrition' under the category of special damages should also be upheld because the judge had provided proper reasons for the reduction of the same. There were also no reasons to disturb the judge's award for these claims under the category of pre-trial damages (see paras 17–18 & 26–27).

(3) In determining the issue related to how the multiplier was derived from the anticipated life-expectancy of the infant plaintiff in the condition she was presently in, all the expert witnesses were agreed that the Strauss data/table ('the table') that was available was an acceptable premise to work out the anticipated life expectancy of the infant plaintiff. In this case, using the table the infant plaintiff fell within the category of individuals classified as 'rolls/sits, cannot walk' and 'fed by others' and the anticipated life expectancy of a female at the age of 15 (which was the closest age group available) was a further 35 years of life. The judge had therefore correctly deduced the likely years of survival for a female cerebral palsy patient like the infant plaintiff to be 50 years. However, there were two errors even if the anticipated life expectancy of 50 years was upheld. The first error was the reduction made on account of the age of the plaintiff and the second was in respect of the agreed deductions on account of contingencies, vagaries of life and the advantage of a lump

sum payment received in advance. As such, the proper calculations to derive the multiplier to be applied should be life expectancy (50) less the infant plaintiff's age at commencement of trial (7) and less contingencies and lump sum in advance (30% or 12.9). Thus, the proper multiplier that ought to be applied in this case was 30 years (50-7-12.9 = 30.1) (see paras 34–38).

(4) It is settled law that appeals against claims under the category of future claims were only justified if the criteria as to proof of the respective heads of claim were not met and if there had to be a recalculation effected by reason of the multiplier being adjusted and finally if the one-third rule applied by the judge was unreasonable in the particular context of any head of claim. As regards the issues related to the sufficiency of proof it should be noted that the assessment of damages in the present case had gone through two levels of process, namely by the deputy registrar and then the judge on appeal. It was thus clear that there were no grounds to disallow any of the awards for those items listed under the category of future claims. Thus, save for the recalculations of the damages awarded to reflect the multiplier applied at 30 there were no grounds for challenging the award (see paras 43 & 45–46).

(5) The plaintiffs' further claims for holiday and respite care and their claim for living expenses for the infant after the latter attained 18 years of age were rightfully rejected (see para 48).

[Bahasa Malaysia summary

Rohgetana a/p Mayatnevan ('kanak-kanak tersebut'), melalui ibu bapanya ('plaintif-plaintif') mengambil tindakan terhadap Dr Navin Kumar dan Dr Darminder Singh Chopra, pegawai-pegawai perubatan yang merawat kanak-kanak tersebut, bagi ganti rugi berasaskan kausa tindakan kecuaian, yang berlaku semasa kelahiran kanak-kanak tersebut di Hospital Melaka ('hospital'). Plaintif-plaintif mendakwa bahawa kecuaian profesional doktor-doktor menyebabkan kanak-kanak tersebut merana akibat cerebal palsy. Hospital juga disaman atas alasan bertanggungan secara vikarius. Hospital juga disaman atas alasan bertanggungan secara vikarius bagi kecuaian doktor-doktor. Defendan-defendan mengaku bertanggungan dan penghakiman ringkas dimasukkan manakala isu ganti rugi dikembalikan kepada timbalan pendaftar bagi taksiran. Timbalan pendaftar mengawardkan ganti rugi bawah empat kategori, khususnya ganti rugi khas bagi kehilangan pendapatan sebelum pemfailan guaman dan tarikh taksiran; ganti rugi pra-bicara atau perbelanjaan yang keluar antara pemfailan guaman dan tarikh taksiran; ganti rugi masa hadapan dan ganti rugi am. Ganti rugi yang diawardkan kepada plaintif-plaintif berjumlah RM6,934,129.30. Walau bagaimanapun, kedua-dua pihak tidak berpuas hati dan masing-masing merayu kepada hakim dalam kamar yang mengurangkan jumlah yang diawardkan kepada plaintif-plaintif menjadi jumlah RM4,859,322.76.

Plaintif-plaintif dan defendan-defendan kini memfailkan rayuan-rayuan mereka terhadap keputusan hakim dalam kamar. Alasan rayuan defendan, antara lain, adalah hanya perbelanjaan yang ditanggung yang disokong bukti dokumentari yang seharusnya dibenarkan sebagai ganti rugi khusus; bahawa berkenaan ganti rugi pra-perbicaraan, sepatutnya terdapat pelarasan pengurangan; dan bahawa berkenaan ganti rugi masa hadapan, kuantum yang diawardkan tidak munasabah. Plaintif merayu terhadap keputusan hakim untuk menyemak pengganda yang diperoleh bagi jangka hayat bayi dari 40 tahun hingga 28 tahun. Plaintif menghujahkan semakan ini tersalah dan rendah dan taksiran timbalan pendaftar perlu dikembalikan. Plaintif menghujahkan lagi bahawa tidak lagi sah bahawa satu pertiga jumlah yang dituntut akan dibenarkan untuk tajuk-tajuk tuntutan berkenaan rawatan perubatan, ubat-ubatan dan rawatan tersedia di hospital-hospital Kerajaan yang boleh diperoleh oleh plaintif bayi, sama ada untuk ganti rugi masa lalu atau masa hadapan. Plaintif seterusnya menegaskan bahawa hakim terkhilaf dalam menolak tuntutan mereka untuk bercuti dan penjagaan tertangguh dan tuntutan mereka untuk perbelanjaan hidup bayi selepas mencapai 18 tahun.

Diputuskan, menyelaraskan jumlah yang diawardkan kepada plaintif sebagai ganti rugi:

(1) Walaupun defendan menegaskan bahawa hanya perbelanjaan untuk terapi dan ubat yang ditanggung seperti yang boleh disokong oleh resit atau bukti dokumentari patut dibenarkan, hakim tidak terkhilaf bawah undang-undang apabila beliau memutuskan ganti rugi khas bagi item-item ini, selagi dikemukakan dan diperincikan, boleh dibuktikan dengan bukti lisan atau dokumentari. Tuntutan tersebut hendaklah dibenarkan selagi kesemuanya dalam jumlah yang munasabah dan boleh dijustifikasikan dalam hal keadaan ini. Tidak ada alasan untuk mengganggu award timbalan pendaftar dan hakim berkenaan dengan terapi dan ubat percuma bawah kategori ganti rugi khas. Atas sebab yang sama, jumlah yang diberi untuk ubat dan terapi bawah kategori ganti rugi pra-perbicaraan juga harus dibenarkan (lihat perenggan 16).

(2) Kuantum yang disemak semula berkenaan dengan tuntutan 'penjagaan oleh ibu' dan 'pemakanan' bawah kategori ganti rugi khas juga harus dibenarkan kerana hakim telah memberikan alasan yang tepat untuk pengurangannya. Tidak ada alasan untuk mengganggu award hakim untuk tuntutan ini bawah kategori ganti rugi pra-perbicaraan (lihat perenggan 17–18 & 26–27).

(3) Dalam menentukan isu berkaitan bagaimana pengganda diperoleh daripada jangkaan jangka hayat plaintif bayi dalam keadaannya kini, kesemua saksi pakar bersetuju bahawa data/jadual Strauss ('jadual') yang sedia ada adalah premis yang diterima untuk menjangka jangka hayat plaintif bayi. Dalam kes ini, menggunakan jadual, plaintif bayi tergolong

dalan kategori individu yang diklasifikasikan sebagai 'berguling/duduk, tidak boleh berjalan' dan 'diberi makan oleh orang lain' dan jangkaan jangka hayat seorang wanita pada usia 15 (iaitu kumpulan umur yang paling dekat) adalah 35 tahun lagi. Oleh itu, hakim telah menyimpulkan kemungkinan tahun bertahan untuk pesakit serebral palsy wanita seperti plaintif bayi adalah 50 tahun. Walau bagaimanapun, terdapat dua kesilapan walaupun jangkaan jangka hayat 50 tahun dibenarkan. Kesilapan pertama adalah pengurangan yang dibuat berdasarkan usia plaintif dan yang kedua adalah berkenaan potongan yang disetujui atas sebab-sebab luar jangkaan, ketidakpuasan hidup dan kelebihan bayaran sekali gus diterima terlebih dahulu. Oleh itu, pengiraan yang betul untuk mendapatkan pengganda yang digunakan mestilah jangka hayat (50) kurang daripada umur plaintif bayi pada awal bicara (7) dan kurang kontinjensi dan jumlah total yang didahulukan (30% atau 12.9). Oleh itu, pengganda yang sepatutnya yang sepatutnya terpakai dalam kes ini ialah 30 tahun (50-7-12.9 = 30.1) (lihat perenggan 34–38).

(4) Adalah undang-undang mantap bahawa rayuan terhadap tuntutan di bawah kategori tuntutan masa hadapan hanya dibenarkan jika kriteria pembuktian kategori tuntutan masing-masing tidak dipenuhi dan jika perlu ada perhitungan semula kerana pengganda yang diselaraskan dan akhirnya jika peraturan satu pertiga dipakai oleh hakim tidak masuk akal dalam konteks tertentu mana-mana kategori. Berhubung dengan isu-isu yang berkaitan dengan kecukupan bukti, perlu diperhatikan bahawa taksiran ganti rugi dalam kes ini telah melalui dua peringkat proses, iaitu oleh timbalan pendaftar dan kemudian hakim atas rayuan. Oleh itu jelas bahawa tidak ada alasan untuk tidak membenarkan mana-mana award bagi item-item yang disenaraikan bawah kategori tuntutan masa hadapan. Kecuali pengiraan semula ganti rugi yang diawardkan untuk menggambarkan pengganda yang digunakan pada 30, tidak ada alasan untuk mencabar award (lihat perenggan 43 & 45–46).

(5) Tuntutan lanjut plaintif untuk percutian dan penjagaan tertangguh dan tuntutan mereka bagi perbelanjaan hidup untuk bayi selepas dia mencapai usia 18 tahun telah ditolak dengan betul (lihat perenggan 48).]

Notes

For cases on assessment, see 12(1) *Mallal's Digest* (5th Ed, 2015) paras 225–236.

Cases referred to

ABDA Airfreight Sdn Bhd v Sistem Penerbangan Malaysia Bhd [2001] 3 MLJ 641; [2001] 8 CLJ 1, HC (refd)

Chai Yee Chong v Lew Thai [2004] 2 MLJ 465; [2004] 2 CLJ 321, CA (refd)

Gleneagles Hospital (KL) Sdn Bhd v Chung Chu Yin (an infant suing through her father and next friend, Chung Shan Yong) & Ors and another appeal [2013] 4

MLJ 785; [2013] 8 CLJ 449, CA (refd)

Inas Faiqah bt Mohd Helmi (an infant suing through her father and next friend, Mohd Helmi bin Abdul Aziz) v Kerajaan Malaysia & Ors [2016] 2 MLJ 1; [2016] 2 CLJ 885, CA (refd)

James Robshaw v United Lincolnshire Hospitals NHS Trust [2015] Med LR 229, QBD (refd)

Appeal from: Civil Suit No 22–111–07 of 2011 (High Court, Melaka)

PS Ranjan (MS Dhillon and KB Karthi with him) (PS Ranjan & Co) in Civil Appeal Nos M-01(IM)-273–08 of 2015 and M-01(IM)-274–08 of 2015 for the appellant.

Nik Mohd Noor bin Nik Kar (Muzila bt Mohamed Arsad with him) (Senior Federal Counsel, Melaka State Legal Advisor's Office) in Civil Appeal No M-01(IM)-275–08 of 2015 for the appellants.

Nik Mohd Noor bin Nik Kar (Muzila bt Mohamed Arsad with him) (Senior Federal Counsel, Melaka State Legal Advisor's Office) in Appeal Nos M-01(IM)-273–08 of 2015 and M-01(IM)-274–08 of 2015 for the respondents.

PS Ranjan (MS Dhillon and KB Karthi with him) (PS Ranjan & Co) in Civil Appeal No M-01(IM)-275–08 of 2015 for the respondents.

Varghese George JCA:

[1] The appellant in Appeals M-01(IM)-273–08 of 2015 and M-01(IM)-274–08 of 2015 was the third plaintiff in an action filed on 3 September 2009, originally in the sessions court. The third plaintiff together with her parents (the first and third plaintiffs) had sued for damages premised on a cause of action in medical negligence which allegedly had occurred during her birth on 19 September 2006 at the Malacca Hospital. It was claimed that in consequence thereof the third plaintiff presently suffers from cerebral palsy.

[2] The defendants who were cited in that action were the appellants now before us in M-01(M)-275–08 of 2015. The first and second defendants were the medical officers attending to the case. The third defendant was sued on the grounds that they were vicariously liable as owners of the Malacca Hospital for the alleged negligence.

[3] The action that had been filed in the sessions court was subsequently transferred to the High Court on 28 January 2011.

[4] On 7 March 2013 the parties entered a consent judgment in the suit whereby the defendants admitted to liability, with the issue of damages remitted to the learned deputy registrar of the court for assessment.

[5] At the hearing of the assessment of damages the parties adduced evidence through witnesses. On 23 October 2014 the learned deputy registrar delivered an award of damages in favour of the third plaintiff in the total sum of RM6,934,129.30 (the plaintiff's total claim was for some RM9,291,904.20, while the defendants were only agreeable to concede to a sum of RM2,009,009.40 thereto).

[6] Both parties being dissatisfied with the award of the learned deputy registrar filed respective appeals against that decision *(lampiran 31* and *lampiran 34B)* to the judge in chambers.

[7] The learned judge dealt with both appeals together and in a decision delivered on 30 June 2015 revised downwards the sum awarded to the first plaintiff to a total sum of RM4,859,322.76.

[8] The third plaintiff and the defendants have respectively now appealed to us as per the appeal proceedings referred to in paras 1 and 2 above against the learned judge's decision.

[9] For convenience the parties will be referred to herein as they appeared in the suit, namely as the plaintiff and the defendants.

SUMMARY OF DECISION

[10] We heard the appeals together on 1 April 2016 and after taking time to consider the respective submissions of counsel we delivered our decision on 6 May 2016. On that day we handed to counsel a 'Summary of Decision', a copy of which is attached to this grounds as ANNEXURE-A.

[11] There were four categories under which damages had been awarded. They were:

(a) *special damages* — loss or expenses incurred before the filing of the suit (35 months);

(b) *pre-trial damages* — loss or expenses incurred between the filing of the suit (30 September 2009) and the date of assessment by the learned deputy registrar (23 October 2014) that is, for 61 months;

(c) *future damages*; and

(d) *pain and suffering/general damages*.

[12] We will in this grounds of decision make reference to ANNEXURE-A to place in proper perspective the categories and the subheads of claim under each of those categories (where applicable) to facilitate in capturing:

(a) what were the respective awards made by the learned deputy registrar and whether such amount allowed had been subsequently varied by the learned judge;

(b) whether an appeal had been taken before us either by the plaintiff or the defendants or by both against the sum ordered by the learned judge; and

(c) our adjustment, if any, made to those appealed items after having considered the submissions of respective counsel.

[13] In that respects, the abbreviations used in the table in the ANNEXURE-A referred to the following:

(a) *@COA Appeal by*: Whether the appeal before us was by the plaintiff (P) or by the defendants (D) or by both (P, D) or there was no appeal (NA) in respect of each item.

(b) *TP*: The learned deputy registrar (timbalan pendaftar)

(c) *JC*: The learned judicial commissioner (judge in chambers)

(d) *P*: Plaintiff's position

(e) *D*: Defendants' position

(f) *COA*: Our computation in respect of each head of claim.

SUBMISSIONS AND OUR DELIBERATIONS

Special damages

[14] The defendants' complaint was that their appeal against the deputy registrar's award in respect of the following items (as in ANNEXURE-A) were not or adequately considered by the learned judge:

(2) Therapies (Spastic Centre)

(3) Complimentary medicine (Ayurvedic)

(6) Care by Mother

(9) Nutrition

[15] The learned judge's treatment of the defendants' respective contentions are found in paras 57–73 of the grounds of judgment. It was common ground that the award of damages under this category would be over a period of 35 months.

[16] In respect of *Therapies (Spastic Centre)* and *Complimentary medicine (Ayurvedic),* the defendants persisted before us that only such expenses incurred as could be supported by receipts (documentary proof) ought to be

allowed. We however did not find that the learned judge had misdirected himself on the law when he held that special damages, so long as they were pleaded and particularised, could be proved by oral or documentary evidence (*ABDA Airfreight Sdn Bhd v Sistem Penerbangan Malaysia Bhd* [2001] 3 MLJ 641; [2001] 8 CLJ 1). Such claims were to be allowed so long they were within a reasonable sum and justifiable in the circumstances. Like the learned judge, we therefore did not find any reason to interfere with the award of the learned deputy registrar in respect of these two items.

[17] In respect of 'Care by mother' and 'Nutrition' the learned judge had agreed with the learned deputy registrar that the plaintiff's claim was justified in the circumstances but had disagreed with the monthly quantum allowed by the learned deputy registrar, that is at the rate of RM500 per month in the case of both items of claim. The learned judge reduced the same to RM300 per month and RM250 per month respectively.

[18] The learned judge had reasoned that as the plaintiff was a toddler/child with cerebral palsy, it called for more particular attention from the mother and further the child required added nutrition during those 35 months; there ought to be sufficient compensation granted for the non-working mother's services and for the special dietary supplements required in the circumstances but not in the sums awarded by the learned deputy registrar. We did not find any fault in that reasoning and accordingly the learned judge's revised quantum were upheld by us.

Pre-trial damages

[19] The defendants' grievance before us was restricted to the sums allowed under the following items by the learned deputy registrar and the learned judge:

(12) Medication

(14) Therapies (Ayurvedic)

(17) Travel/Transportation

(18) Care by other

(20) Nutrition

[20] The plaintiff, on the other hand, was dissatisfied with their claim for 'Holidays and respite care' being not entertained by the learned deputy registrar and the learned judge.

[21] With respect to 'Medication', it was the defendants' contention that no sum should be allowed for medicines purchased at private clinics or pharmacy

as they were available at government clinics without any charge. The learned judge nevertheless upheld the sum of RM1,575 awarded by the deputy registrar stating that such an sum was within reasonable extent considering that it was a small amount incurred over a period of 61 months, and as contended, for emergency medication for minor ailments like influenza and such like.

[22] As regards the therapies (Ayurvedic), the defendants' contention, similarly as under special damages, was that only the receipted amount of RM5,837 ought to be allowed. As earlier allowed under special damages, the learned judge upheld the learned deputy registrar's decision that this was a reasonable expense that could be proved even by oral evidence.

[23] We were not convinced therefore that the learned judge had erred in his conclusion in respect of the claims under the heads of 'Medication and Therapies (Ayurvedic)' and accordingly refused to interfere with the same.

[24] Under the item *Travel/Transportation* the learned deputy registrar had awarded, a sum of RM82,191 made up of as follows:

(a) *RM39,491.60* representing 50% of the cost of purchasing a Toyota Avanza; and

(b) *RM42,700* being cost of petrol calculated at RM700 per month for the 61 months period.

This was upheld by the learned judge.

[25] It was the defendants' contention before us that there ought to be an adjustment downwards principally considering that the vehicle in question was likely to be used by members of the family for other purposes during that period, and not solely for purposes of the plaintiff. We found merit in this contention and accordingly was of the view that while maintaining an award for 50% only in respect of the cost of the vehicle, a downward adjustment ought to be made in respect of the sum awarded for 'petrol' utilisation. Accordingly we reduced the award under this item to a total of RM60,841.60 broken down as follows:

RM39,491.60 (50% of cost of vehicle)

RM21,350.00 (RM350.00 per month for petrol x 61 months)

[26] As regards the award for 'Care by Mother', the learned deputy registrar had allowed the same at the rate of RM500 per month while the learned judge had reduced the rate to RM400 per month. We were of the view that there was justification to reduce this rate further to RM200 per month for this period of 61 months when, as it would be appreciated, the plaintiff was between the age

of three years to eight years; the previous period of the plaintiff's life up to 35 months was a more critical phase and similar care by the mother was only, in any event, compensated at the rate of RM300 per month. There was also evidence that the plaintiff's general condition had also shown some improvement over time.

[27] However with regard to 'Nutrition' we were in agreement with the learned judge that the plaintiff required more and better nutrition as she was growing up and an award of RM350 per month for additional nutrition was fair in the circumstances; this compared well with the award of RM250 per month for nutrition granted to the plaintiff in respect of the earlier phase of her life up to 35 months. We found no reason therefore to disturb the learned judge's award under this head of claim.

[28] The defendants' contention, as earlier alluded to, was that 'mothers care' and 'nutrition' constituted normal incidents in a child's life which had in any event to be borne by all parents. We however rejected that argument since the plaintiff in this case was a 'cerebral palsy-child' and that state of affairs required a different and involved nature of care and attention in the child's growing up years, unlike that would be the case with a normal child.

[29] The plaintiff's complaint that its claim for 'Holidays and respite care' during this period had been wrongfully disallowed by both the learned deputy registrar and the learned judge, is dealt with by us below under the *future damages* category, where a similar head of claim was also advanced by the plaintiff but had also been rejected by both the learned deputy registrar and the learned judge.

Future damages

[30] The respective items that were the subject of the appeals by the defendants and the plaintiff before us are as denoted by 'D' and 'P' in ANNEXURE-A under the listing of claims for future damages. The defendants' contention were basically that the heads of claim were not supported by the medical evidence, was speculative and in any event, the quantum awarded was unreasonable. It was also the argument of the defendants that certain of the future treatment or medical attendances as outlined by the plaintiff were available in the government hospital and related official facilities. Accordingly it was contended that such claims for 'future damages' ought not be allowed at all and even if allowed, not for the sums ordered by the learned deputy registrar and/or the learned judge.

[31] On the part of the plaintiff the thrust of counsel's submission was primarily three-fold, namely:

(a) the derived multiplier with respect of the life-expectancy of the plaintiff which was revised and applied by the learned judge (28 years) was erroneous and low; the assessment of the learned deputy registrar thereto of 40 years should be reinstated;

(b) the supposedly applied one-third only rule, whereby costs or expenses of certain items of claims put up by a plaintiff was not allowed in full if it was shown such treatment or amenities were available or accessible at government hospitals or facilities, was no longer good law in the light of the recent Federal Court decision in *Inas Faiqah bt Mohd Helmi (an infant suing through her father and next friend, Mohd Helmi bin Abdul Aziz) v Kerajaan Malaysia & Ors* [2016] 2 MLJ 1; [2016] 2 CLJ 885; and

(c) the paramount consideration in considering claims for future medical expenses as also elucidated in *Inas Faiqah* was 'reasonableness' of those expenses and further that the standard of proof required of a claimant was a 'lower degree of certainty'.

[32] We first address the issue related to how the multiplier was derived from the anticipated 'life-expectancy' of the plaintiff in the condition she was presently in. We must firstly highlight the fact that the learned judge had extensively analysed the testimonies of both party's respective witnesses (SP6, SD2, SD1) (see paras 13–24, in particular paras 19–20). The learned judge preferred the evidence of the SD1 especially with regard to the likely life expectancy of a person in the particular state or condition as was the plaintiff in at the commencement of trial. This was to be specifically with reference to her developmental milestone at that point, namely when the damages were to be assessed for future losses.

[33] SP6's original assessment was that the plaintiff had to be fed by caregiver but under cross-examination SP6 agreed that the plaintiff had shown much improvement since her first assessment. SD2's evidence was that the plaintiff, '*... Boleh makan dengan sendiri menggunakan tangan kanan dengan sedikit bantuan daripada ibunya*'. SDI's evidence was that at the age of seven years (when the consent judgment was entered) the plaintiff '*could only hold a milk bottle with her right hand but could not feed herself or transfer objects between hands ... could not grasp objects with her left hand*'. It was not in serious dispute that the plaintiff could not still sit-up on her own or walk.

[34] Although some other reference work was recommended by the witness for the plaintiff, all the aforesaid expert witnesses were nevertheless agreed that the Strauss data/table that was available was an acceptable premise for the court to draw some assistance to work out the anticipated life expectancy of the

plaintiff; this was because there were no comparable Malaysian studies or statistics available on the subject. The learned judge placed reliance on the Strauss data/table since the English court in *James Robshaw v United Lincolnshire Hospitals NHS Trust* [2015] Med LR 229, involving a similarly circumstanced cerebral palsy child, had also referred and analysed the findings set out in that Strauss data/table where the authors of the same had noted:

> Survival prognosis for persons with CP should take into account age and severity of disability.

[35] The basic underlying thesis was that the developmental state or condition that a cerebral palsy patient was at a particular age would give a fair indication of the full life-expectancy of that particular patient, that is, in contrast to the general life expectancy of an ordinary individual, either female or male as the case maybe, amongst the general population. In this case, using the Strauss data/table (2008) the plaintiff fell within the category of individuals classified as 'Rolls/sits, cannot walk' and 'Fed by others' (FBO) and the anticipated life-expectancy of a female, according to the table at the age of 15 (which was the closest age group available), was a further 35 years of life. (An extract of the Strauss data/table reproduced at p 350 of the *Robshaw* case report is attached hereto as ANNEXURE-B).

[36] The learned judge had therefore, in our assessment, correctly deduced the likely years of survival for a female cerebral palsy patient like the plaintiff to be *50 years*, that is, 35 years (as in the table) plus the 15 years (the age at which the analysis was pegged to) as per the 2008 Strauss data/table. This was the starting point from which the multiplier was to be worked out subject to adjustments for the relevant age and other contingencies.

[37] However, as submitted by counsel for the plaintiff there was in any case two errors even if the anticipated life expectancy of 50 years as determined by the learned judge was upheld. They were:

(a) the reduction made on account of the age of the plaintiff should be as at the time of commencement of trial/admission of liability. The plaintiff was aged seven years then and the deduction should be only seven, and not eight which was her age after the assessment of damages were completed; and

(b) the further *agreed* deductions on account of contingencies, vagaries of life and the advantage of a lump sum payment received in advance should be *30%*. This was accepted by the learnedjudge but in the arithmetical calculation the deduction in effect amounted to 33.3% of the balance after the life expectancy of 50 years had been reduced by '8 years' (wrongfully, as adverted to above). In other words, even if 42 years was to be the base figure, a 30% reduction thereto would have resulted

in:42 minus12.6=29.4 years and not the 28 years as ruled by the learned judge to be the applicable multiplier.

[38] We found merit in both the submissions aforesaid of the plaintiff and accordingly was of the view that the proper calculations to derive the multiplier to be applied should be as set out below:

Life Expectancy....	35 + 15 = 50
Less Age at commencement of Trial/ admission of liability....	- 7
	43
Less Contingencies and Lump sum in advance	- 30%
	(12.9)
	30.1
Multiplier to be adopted:	30 years.

The proper multiplier that ought to be applied in this case, in our unanimous view was *30 years* in the particular circumstances and with due regard of the plaintiff's condition in this case.

[39] There was an incidental issue raised by the defendants that the 30% deduction referred to as 'agreed' was never the subject of any agreement by the defendants. Our attention was drawn to the grounds of the learned deputy registrar which expressly stated that the parties had agreed that the deductions to be effected on account of contingencies etc would be 30%. No issue seem to have been specifically taken in respect of that at all by the defendants before the learned judge who then proceeded to further affirm that the quantum of deduction of 30% was agreed to by the parties, save that the learned judge, as elaborated above had made an arithmetical error in the calculation thereof applying a 33.3% deduction.

[40] The plaintiff's next overarching contention was that it was no longer the law that only a sum of 1/3 of the sum claimed would be allowed for heads of claims in respect of which medical attention, medication and treatments was available at government hospital or similar public facilities that was accessible to a person, such as in this case, the plaintiff. This, it was further argued, was irrespective of whether it was for past or future damages. The counsel for the plaintiff cited the recent Federal Court decision in *Inas Faiqah* in support of this submission

[41] The Federal Court in *Inas Faiqah* in referring to the so called application of the 'one-third practice', argued by some to have been propounded by the Court of Appeal in *Chai Yee Chong v Lew Thai* [2004] 2 MLJ 465; [2004] 2 CLJ 321 and in *Gleneagles Hospital (KL) Sdn Bhd v Chung Chu Yin (an infant suing through her father and next friend, Chung Shan Yong) & Ors and another appeal* [2013] 4 MLJ 785; [2013] 8 CLJ 449, had this to say:

> [36] In this respect, we are in agreement with the contention of the appellant that the case of *Chai Yee Chong* is not relevant to the present case. We respectfully say that the Court of Appeal had erred in coming to its conclusion that the award made by the learned trial judge was in line with the current practice on the strength of the decision of *Chai Yee Chong*, which is a case concerning a claim for past private medical treatment. *In determining a claim for future medical treatment, be it at a private, or at a public hospital, the question of reasonableness in making such a claim should always be the paramount consideration.* The plaintiff not only needs to justify, for instance, why he chooses treatment at a private hospital over a public one, but he must also shows that the amount claimed for such treatment is reasonable. Of course this can be satisfied by the production of compelling evidence for that purpose. It is to be noted that in claiming for the cost of future damage in Gleneagles, evidence was led as to the cost of rehabilitation care of the first respondent and the costing was obtained from the private hospitals/centres. (Emphasis added.)

(On the evidence in *Inas Faiqah*'s case however, the Federal Court was of the view that it was fair and reasonable for the trial court to have only awarded one-third of the amount claimed there).

[42] It is pertinent at this point to also reproduce the further observations of the Federal Court in *Inas Faiqah* which, undoubtedly has now put at rest certain doubts or controversy in respect of what were the salient matters to be borne in mind when the court was called upon to assess the damages to be awarded, particularly in the context of medical negligence cases.

[43] With regard to what would be fair damages, the apex court said:

> [20] *It is trite that damages serve as compensation, not a reward, less still a punishment (see Ong Ah Long v Dr S Underwood* [1983] 2 MLJ 324; [1983] 2 CLJ 198; [1983] CLJ Rep 300. *In assessing damages, the court should not be motivated by sympathy and award fair compensation based on cogent evidence. The court should not descend into a domain of speculation. The evaluation of those evidence, which form the basis of any risk of future damage, must therefore still be undertaken. And the trial judge can only evaluate such evidence based on the recognised balance of probabilities standard.* As was stated in *Schrump* ([1977] 82 DLR (3d) 553):
>
> > Thus, future contingencies which are less than probable are regarded as factors to be considered, provided they are shown to be substantial and not speculative.

> The qualification as underscored in that sentence is in our considered view, necessary to be proven on a balance of probabilities.
>
> ...
>
> ...
>
> With the above proposition, we are of the view that *the standard of proof with regard to the assessment of future loss of damage is on the balance of probabilities, but with a lower degree of certainty as to the occurrence of such loss or damage in the future. From the authorities, one can say that such a lower degree to be attached is best termed by the word 'possibility', 'chance', 'risk', 'danger' or 'likelihood', but regardless of the words used and their semantics, they must also essentially be a substantial one and not speculative, and that the standard of proving* such 'possibility', 'chance', 'risk', 'danger' or 'likelihood' of the future damage *is still, in our opinion, on a balance of probabilities.* (Emphasis added.)

[44] Further, in *Inas Faiqah* the Federal Court noted that the appellant there was of the view that the claimant's evidence was not required to be weighed according to standards of scientific proof, strict proof, specific proof or even the balance of probabilities (para 9 of the judgment). To that the Federal Court said:

> [17] Having perused the authorities advanced by learned counsel for the appellant, we are of the view that the appellant's contention regarding the applicable standard of proof as regards future loss and damage was mistaken. We say so because *while it is true that a plaintiff needs only to show that there is a reasonable chance of a loss or damage occurring in order for him to succeed in his or her claim for future loss or damage, the standard of proof* required in proving such a claim remains the same that is on *the balance of probabilities.* In our understanding, the principles set in *Schrump et al v Koot et al* (1977) 82 DLR (3d) 553 and *Hawkins v New Mendip Engineering Ltd* [1966] 3 All ER 228 merely outline the degree of certainty to be attached in relation to the assessment of the chance of likelihood that a loss or damage might reasonably happen in the future loss and damage. In our view, such principles relate and should be understood in the context of the extent of the evidential value that the plaintiff needs to demonstrate in order to establish the claim for future loss or damage, which can be satisfied by the production of the related and sufficient evidence from the expert or by some other cogent evidence. (Emphasis added.)

[45] Reverting then to the specific appeals by the respective parties in respect of the claims under the category of *future claims* as set out in ANNEXURE-A, we were of the view that our intervention was only justified where, *firstly*, if the criteria as to proof of the respective heads of claim as now elucidated in *Inas Faiqah* by the Federal Court were not met, *secondly,* if there had to be a recalculation effected by reason of the multiplier being adjusted from 28 years to 30 years as discussed and ruled above, and finally, if the '1/3 rule' applied by the learned judge was unreasonable in the particular context of any head of claim.

[46] As regards the issues related to the sufficiency of proof (on a balance of probabilities) and reasonableness of the items and sums claimed thereunder, we must highlight the fact that assessment of damages had gone through two levels of process, namely by the learned deputy registrar and before the learned judge on appeal. We did not find their conclusions to be plainly wrong to disallow any of the awards for those items listed under that category.

[47] It will be noted that save for the following the recalculations of the damages awarded by us was to reflect the multiplier applied at 30 years and the exclusion of the '1/3 rule' as applied by the learned deputy registrar and/or the learned judge:

(a) *37. Travel:* The reasonable quantum for petrol per month, in our view, was RM500 (in place of RM700 allowed) but for 30 years noting in particular that the petrol expenses allowed under the pre-trial period had been now adjusted downwards to RM350 per month; and

(b) *40. Specialist Consultations*: We maintained that there be allowed nine consultations each year for 30 years but this was an item where the 1/3 of the RM180 per visit sought as damages would constitute a reasonable sum as similar consultation could be availed of by the plaintiff at government facilities.

[48] Turning then to the plaintiff's further claims for: (a) holiday and respite care; and (b) for living expenses after attaining 18 years of age, we only need to refer to the decision of the Federal Court in *Inas Faiqah* where similar heads of claim advanced for the plaintiff there was rejected on account of the fact that there was already an award for home modifications to accommodate the special needs of the plaintiff even after she attained 18 years of age and going on holidays was common in our society and the plaintiff's family would have in any event incurred such a cost regardless of the negligence of the defendants (see paras 56–59 of the judgment of the Federal Court). Similar circumstances obtained here in this instant appeal before us, and we were of the view that these claims of the plaintiff were rightfully rejected by the learned deputy registrar and the learned judge.

[49] Finally, as regards the defendants' claim that there ought to be deductions from whatever sums awarded to the plaintiff (a) to account for tax/rebates or allowances that might be entitled to on the grounds of the plaintiff's condition or status as an 'Orang Kurang Upaya' (OKU); and (b) to account for the costs of a normal cost of living which would have in ordinary course been incurred by the plaintiff or her parents, we found these contentions highly speculative, general and lacking in specifics or details to be given any serious consideration. In any event, whatever rebates or deductibles that might

arise in the circumstances under the tax regime was for the benefit of and meant to alleviate the suffering of the parents, and not the plaintiff per se.

[50] In the circumstances and for the reasons elaborated above the final award of damages we allowed to the plaintiff were as set out in the amounts and for the respective items/heads of claim as per the last column in ANNEXURE-A to this grounds.

ANNEXURE-A

M-01-273-08/2015 (P's appeal)
M-01-274-08/2015 (P's appeal)
M-01-275-08/2015 (D's appeal)

SUMMARY OF DECISION

A. Life Expectancy of Plaintiff – Multiplier to be applied

P still need some assistance; she is not able to fully self-feed herself.

With reference to the Strauss Data/ Table (2014) relied by both parties, our calculation is as follows

Life Expectancy	35 + 15 = 50	
Less Age at date of commencement of Trial/admission of liability	- 7	43
Less Contingencies and lump sum payment in advance – agreed by parties to be 30%	- 30%	30.1
Multiplier to be adopted in this case		30 years

B. SPECIAL DAMAGES

No	Item	@ COA Appeal by:	TP	JC	P	D	COA
1.	Hospitals and clinics	NA	2826.70	2826.70			2826.70
2.	Therapies (Spastic Centre)	D	6000.00 RM20 x 12 x 25 mths	6000.00		1618.20	6000.00
3.	Complimentary medicine (Ayurvedic)	D	1050.00	1050.00		Nil	1050.00
4.	Medical reports	NA	40.00	40.00			40.00
5.	Travel	NA	20690.00	20690.00			20690.00
6.	Care by mother	D	17500.00	10500.00 RM300 pm x 35 mths		(7000.00)	10500.00
7.	Care by aunt	NA	Nil				-
8.	Care by grandmother	NA	Nil				-
9.	Nutrition	D	17500.00	8750.00 RM250 pm x 35 mths		Nil	8750.00
10.	Hygiene	NA	Nil				-
11.	Travel by grandmother	NA	Nil				-
							49856.70

A B C D E F G H I

C. PRE-TRIAL DAMAGES (Filing of Writ (30.09.2009) to TP Assessment (23.10.2014) – 61 months)

No	Item	@ COA Appeal by:	TP	JC	P	D	COA
12.	Hospitals, Clinics, Medication (2000 + 1575)	D	3575.00	1575.00		1575.00	**1575.00**
13.	Pain and suffering from surgery, botox and serial casting	NA	Nil	Nil			
14.	Therapies (Ayurvedic)	D	23100.00 RM50 x 22 mth x 21 session pm	23100.00		5837.00 per receipt (April 2013 to Feb. 2014)	**23100.00**
15.	Home visit physiotherapy	NA	650.00	650.00			**650.00**
16.	Complimentary medicine (Spastic School)	NA	3050.00	2600.00			**2600.00**
17.	Travel (Toyota M/Van – Petrol – (1/3)	D	82191.60	82191.60		39540.70	**60841.60** RM39,491.60(50% cost of vehicle) + RM21,350.00 (Petrol – RM350 pm x 61 mths)
18.	Care by mother	D	30500.00	24400.00 RM400 x 61 mths		(12200.00) RM200 x 61 mths)	**24400.00**
19.	Care by grandmother	NA	Nil	Nil			-
20.	Nutrition	D	34500.00 RM500 x 61 mth	21350.00 RM350 x 61 mths		Nil	**21350.00**
21.	Hygiene	NA	18700.00	10445.40			**10445.40**
22.	Holidays and respite care	P	Nil	Nil			-
23.	Appliances and equipment	NA	3236.00	3236.00			**3236.00**
							148197.60

D. FUTURE DAMAGES

No	Item	@ COA Appeal by:	TP	JC	P	D	COA
28.	Surgery (for joint contracture) (available in Govt Hospital)	D	19000.00	19000.00		(6500.00)	**19000.00**
29.	Pain and suffering from surgery	D	30000.00	30000.00		**Nil**	**30000.00**
30.	Home modifications	NA	150000.00	150000.00			**150000.00**
31.	Therapies (physio, occupational, speech – available at Govt facilities)	D P (multiplier)	835200.00 (RM1740 x 12 x 40 yrs)	584640.00 (RM1740 x 12 x 28 yrs)		162960.00 (Physio – 135 x 12 x 28 yrs (45360.00) (Occupational – RM135 x 12 x28 yrs (45360.00) (Speech – RM215 x 12 x 28 yrs (72240.00)	**626400.00** (RM1740 x 12 x 30 yrs)
32.	Complimentary treatment	D P (multiplier)	1496800.00	976740.00		553380.00	**1125600.00**
	(i) Ayurvedic		110800.00 (RM110 x 21 sessions x 12 x 40)	726160.00 (RM110 x 21 sessions x 12 x 28)			831,600.00 (RM110 x 21 sessions x 12 x 30 yrs)
	(ii) Hydrotherapy		192000.00 (RM400 x 12 x 40)	134400.00 RM400 x 12 x 28)			144,000.00 (RM400 x 12 x 30 yrs)
	(iii) HBOT (Agreed)		12000.00	12000.00			12000.00

No	Item	@ COA Appeal by:	TP	JC	P	D	COA
	(iv) Stem Cell		160,000.00 (RM4000 x 40)	37380.33 (RM4000 x 1/3 x 28)			120000.00 (RM4000 x 30)
	(v) Acupuncture		24000.00 (RM600 x 40)	16800.00 (RM600 x 28)			18000.00 (RM600 x 30)
33.	Maids	D P (multiplier)	1108000.00 (RM27700 x 40)	775600.00 (RM27700 x 28)		292992.00	**831000.00** (RM27700 x 30)
34.	Care by parents	D P (multiplier)	2400000.00 (RM500 x 12 x 40)	134400.00 (RM400 x 12 x 28)		(67200.00)	**180000.00** (RM500 x 12 x 30)
35.	Hygiene	D P (multiplier)	144000.00 (RM300 x 12 x 40)	100800.00 (RM300 x 12 x 28)		57590.40	**108000.00** (RM300 x 12 x 30)
36.	Nutrition	D P (multiplier)	2400000.00 (RM500 x 12 x 40)	134400.00 (RM400 x 12 x 28)		(56112.00)	**144000.00** (RM400 x 12 x 30)
37.	Travel	D P (multiplier)	826000.00 (RM490000 - Van + RM336000.00 - Petrol)	585200.00 (RM350000 - Van + RM235200.00 - Petrol) (700pm x 12 x 28)		381200.00	**530000.00** (RM350000 - Van + RM180000.00 - Petrol) (500 x 12 x 30)
38.	Assistive devices (+ computer)	P (Multiplier: No 1/3)	483700.00 (100000.00 computer)	341400.00 231500.00 (Devices) (Additional)		291400.00	**341400.00**

No	Item	@ COA Appeal by:	TP	JC	P	D	COA
				4800.00 12500.00 17600.00 25000.00 (Computer) 50000.00			
39.	Hospital and clinic visits	P (*)	53320.00 (RM4000 x 1/3 x 40)	37324.00 (RM4000 x 1/3 x 28)			**120000.00** (RM4000 x 30)
40.	Specialist consultations	P (*)	21600.00 (180 x 1/3 x 9 Specialists x 40)	15120.00 (RM180 x 1/3 x 9 x 28)			**16200.00** (RM180 x 1/3 x 9 x 30)
41.	Medication	P (*)	16800.00 (35 x 12 x 40) (35 = 1/3 x 100)	11760.00 (35 x 12 x 28)			**12600.00** (35 x 12 x 30)
42.	Botox	P (*)	144000.00 (RM1600 x 2 x 40)	20533.00 (RM2200 x 1/3 x 28)			**66000.00** (RM2200 x 30)
43.	Special education	P (*)	480000.00 (RM3000 x 1/3 x 12 x 40)	336000.00 (RM3000 x 1/3 x 12 x 40)			**720000.00** (RM2000 x 12 x 30)
44.	Holidays and respite care	P	Nil	Nil			-
45.	Living expenses after attaining age of 18 years	P	Nil	Nil			-
							5020200.00

A B C D E F G H I

E. GENERAL DAMAGES

No	Item	@ COA Appeal by:	TP	JC	P	D	COA
46.	General damages for pain suffering and loss of amenities	NA	385000.00	385000.00			385000.00

F. DEDUCTIONS (Benefits)
(Defendant's appeal)

No	Item	@ COA Appeal by:	TP	JC	P	D	COA
47.	Normal costs v OKU	D	Nil	Nil			Nil
48.	Income tax rebate	D	Nil	Nil			Nil

G. INTEREST

TP's award: (i) 4% on Special Damages from 19.11.2006 (incident) to (07.03.2012). 07.03.2013 (judgment on liability)

(ii) 8% on Pre Trial Damages + Damages for Pain and Suffering/Loss of Amenities from (13.11.2008)(13.10.2009) to date of judgment on liability (07.03.2012)

(iii) 5% on Judgment sum from 07.03.2013 to date of payment.

JC: - affirmed above.

COA: (a) At 5 % pa from date of filing of Suit (30.09.2009) until full settlement on

(i) Special Damages (49856.70)
(ii) Pre Trial Damages (148197.60)
(iii) Pain and Suffering (385000.00)

(b) On all other damages awarded at 5% pa from date of judgment on liability (07.03.2013) until full settlement.

H. COSTS - To be submitted by Counsel.

Order accordingly.

Reported by Kohila Nesan